

Prem (Migration) [2023] AATA 1961 (26 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Thach Prem
REPRESENTATIVE:	Mr Tim Madigan
CASE NUMBER:	1913334
HOME AFFAIRS REFERENCE(S):	BCC2017/2564478
MEMBER:	Edward Howard
DATE:	26 May 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations

Statement made on 26 May 2023 at 8:52am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – relationship ceased – family violence – non-judicially determined claim – social isolation – physical and sexual abuse – verbal and emotional abuse – financial abuse – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), rr 1.15A, 1.23, 1.24; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 19 July 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211.
5. The Tribunal has considered all of the evidence, which includes extensive documentary evidence and submissions provided to the Tribunal and is satisfied that a decision can be made without the need for a hearing.
6. The applicant was represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

8. Issues And Law

9. There is a two-stage process for onshore Partner visas. A visa applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the first, temporary stage.
10. Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.15A(3) matters may relate to circumstances after the time of application. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the sponsor were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.¹ The Tribunal observes this to be a matter where the visa applicant submitted limited documentary evidence in support of his visa application to the Department of Home Affairs and then furnished the Tribunal with further evidence that was unavailable to the primary decision maker.
11. The issue in the present case is whether at the time of the visa application and the time of this decision, the parties satisfy the criteria under cl.820.211 and cl.820.221.

¹ *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it ‘tends to logically show the existence or non-existence of’ the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

Whether the parties are in a spouse or de facto relationship

12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
13. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

14. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

15. Are the other requirements for a spouse relationship met?

- *Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*
16. The evidence of the parties is that they first met in July 2016 and committed to a shared life together in April 2017. At this time, they commenced living together and were married on 27 May 2017. The parties remained living together as a married couple until September 2019 (a period of approximately 2.5 years), when the marriage broke down as a result of alleged family violence committed by the sponsor against the visa applicant. The parties have been separated since that time.
 17. The alleged family violence consisted of controlling and intimidating behaviour, social isolation, physical and sexual abuse, verbal and emotional abuse and financial control.
 18. As a result of the controlling and intimidating behaviour of the sponsor, the visa applicant alleges that the sponsor exploited and abused the visa applicant financially, by demanding that she provide him with money to satisfy alcohol and gambling addictions.
 19. Whilst the parties opened a joint bank account, it was rarely used as the sponsor did not want Centrelink to be aware of the relationship and so affect his welfare payments. The parties did have joint liability as tenants for their residence and the obligations that flowed under the tenancy agreement. They do not hold any joint real estate or other major assets.
 20. The Tribunal accepts the evidence of the visa applicant that despite the fact the parties did not own real estate or major assets, they did each contribute to the financial relationship. This included the regular payment of rent, utilities and other day-to-day household expenses. The parties cohabited for approximately 2.5 years and the financial relationship existed continuously during that time.

21. The Tribunal finds that the parties had joint liabilities and obligations, that they pooled their financial resources and that they shared day-to-day household expenses. The Tribunal weighs the financial aspects of the relationship in favour of the visa applicant.
22. *Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*
23. The evidence of the parties is that they met in July 2016, their relationship developed and were married in May 2017. The parties cohabited continuously for 2.5 years until the breakdown of the relationship in September 2019. During this period, they were jointly liable and responsible for the payment of rent for their residence together with the normal utilities expenses.
24. The sponsor's son was a regular visitor to their house and would stay Friday, Saturday and Sunday evenings every fortnight. The Tribunal accepts the evidence that the visa applicant developed a close relationship with her stepson and that she and the sponsor jointly cared for him during the time he spent in their home.
25. The evidence before the Tribunal is that the visa applicant and the sponsor shared the household chores although it was primarily the responsibility of the applicant.
26. The Tribunal places weight on the parties' living arrangements, based on the evidence that they lived together from April 2017 until September 2019.
27. The Tribunal is satisfied that the parties' household and living arrangements are consistent with that of a married couple in a genuine relationship. The parties also shared the care and support of the sponsor's stepson as a regular guest to their home. Based upon the evidence received, the Tribunal weighs the household aspects in favour of the visa applicant.
 - *Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*
28. The parties have provided extensive evidence supporting their claim of being in a genuine relationship. The evidence demonstrates the clear recognition by family, friends and acquaintances, of the parties as a genuine couple over a period of more than 3 years. The Tribunal places weight upon the statements provided in support.
29. The parties also provided photographic evidence of their wedding and extensive social interaction and other activities, including with members of each of their families.
30. The Tribunal is satisfied on the evidence that the parties represented themselves to other people as being in a long-term and genuine married relationship, that they held the favourable opinion of family, friends and acquaintances about the nature of their relationship and that they regularly planned and undertook joint social activities. The Tribunal weighs the social aspects of the relationship in favour of the visa applicant.
 - *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*
31. The parties first met in July 2016, committed to an exclusive relationship in April 2017 and were married on 27 May 2017. The parties lived together for 2.5 years until the marriage broke down as a result of alleged family violence on the part of the sponsor. Prior to that

time, the evidence before the Tribunal is that the parties maintained a genuine and continuing relationship as a married couple as evidenced by the financial and social aspects of the relationship as well as the nature of the household. The parties regularly cared for and supported the sponsor's son and had regular interaction with members of both of their families.

32. The parties have provided the Tribunal with extensive evidence as to the genuineness of the relationship, the social acceptance of each of them with their families and friends and their commitment as a couple. The parties have spent considerable time with family members and friends in various locations.
33. From the evidence provided, the Tribunal finds that the parties were in a genuine and continuing relationship, displayed a strong commitment to each other, provided significant emotional support to each other and clearly saw the relationship as long-term.
34. In this regard, the Tribunal notes the Statutory Declaration of the sponsor, sworn 5 March 2018, forming part of a submission regarding a penalty imposed upon the sponsor in an unrelated matter. The document is highly relevant to the issue of the genuineness of the relationship and the commitment of the parties while they were living together as a married couple, from the perspective of the sponsor. In this document, the sponsor refers lovingly and kindly to the visa applicant as his wife and refers to the fact that the visa applicant is entirely aware of his criminal history (a copy of which is before the Tribunal), namely "She knows my situation". In spite of this criminal history, the Tribunal accepts the evidence that the visa applicant, for a period of time, had a positive impact on the behaviour and well-being of the sponsor. The Tribunal finds this evidence strongly supports the visa applicant's contention that she and the sponsor were in a genuine relationship and provided each other with significant emotional support.
35. The Tribunal has been provided with persuasive evidence that the sponsor subjected his wife to serious and ongoing family violence during the relationship.
36. The sponsor's violence towards his wife included controlling and intimidating behaviour, especially in relation to the visa applicant having contact with other people and threatening to 'cancel her visa' if she did not provide him with money for alcohol and gambling. The sponsor would regularly demand money from the visa applicant for one purpose but then use it for another without her consent.
37. The sponsor also subjected the visa applicant to what was effectively social isolation by preventing her from contacting or visiting her family. At times, the sponsor would close the front door and not allow the visa applicant to leave the house. On one occasion, the visa applicant stayed her daughter's house overnight but did not tell the sponsor for fear that he would stop her from going. When she returned the next day, he was extremely angry with her and subjected her to yelling and other verbal abuse. The sponsor would apologise for his actions afterwards, but the visa applicant's evidence is that his behaviour did not change.
38. The sponsor subjected the visa applicant to physical and sexual abuse. He was significantly taller than his wife and would physically intimidate and assault her. The sponsor would also pressure his wife to have sexual relations with him. She complied with his demands as she was scared of his physical presence and often this behaviour occurred whilst he was severely intoxicated.
39. The sponsor regularly subjected the visa applicant to verbal and emotional abuse, including yelling and swearing at her and threatening her with the cancellation of her visa.

40. The sponsor also subjected the visa applicant to financial abuse. This was most often in the form of demanding money from her to satisfy his alcohol and gambling addictions. The visa applicant's evidence is that the sponsor was regularly drunk and consumed up to 1 carton of beer each day. The visa applicant was working at a local farm, often for 12 hours a day, five days per week and would be required to give \$300 – \$400 per week to the sponsor.
41. The Tribunal is satisfied that at the time the visa application was made, the parties satisfied the definition of "Spouse" as defined in Section 5F of the Act; in that they were validly married; had a mutual commitment to a shared life as a married couple to the exclusion of others; that the relationship between them was genuine and continuing; and that they lived together. The Tribunal is therefore satisfied that the parties relationship fulfilled the criteria contained in Cl.820.211(2) of the Regulations at the time the visa application was made.
42. Pursuant to Cl.820.221(1), in order to be eligible for the grant of a Subclass 820(UK) visa, the applicant must also continue to meet the requirements of Cl.820.211(2) at the time of this decision. Having regard to the evidence before the Tribunal of the separation of the parties, this threshold is, prima facie, unable to be satisfied. However, the visa applicant has claimed that she was subjected to family violence committed against her by the sponsor prior to their separation. Clause 820.221 can alternatively be met if, relevantly, the requirements of cl 820.221(3) are met.
43. Cl.820.221(3) of the Regulations states as follows:
 - (3) *An applicant meets the requirements of this subclause if:*
 - (a) *the applicant would continue to meet the requirements of subclause 820.211(2), (5) or (6) except that the relationship between the applicant and the sponsoring partner has ceased; and*
 - (b) *either or both of the following circumstances applies:*
 - (i) *either or both of the following:*
 - (A) *the applicant;*
 - (B) *a dependent child of the sponsoring partner or of the applicant or of both of them;**has suffered family violence committed by the sponsoring partner;*
44. Therefore, if the Tribunal is satisfied that the visa applicant would continue to meet the requirements of Cl.820.211(2) except that the relationship has ceased and, if it is satisfied that the visa applicant had family violence committed against her by the sponsor, as alleged, then the visa applicant will meet the requirements of Cl.820.221 at the time of the decision.
45. Regulation 1.23(9) of the Regulations states the following:
 46. *"For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:*
 47. *(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and*
 48. *(b) the alleged victim is:*
 49. *(i) a spouse or de facto partner of the alleged perpetrator; or*
 50. *(ii) a dependent child of:*
 51. *(A) the alleged perpetrator; or*

52. (B) the spouse or de facto partner of the alleged perpetrator; or

53. (C) both the alleged perpetrator and his or her spouse

54. or de facto partner; or

55. (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

56. (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 124 that:

57. (i) the alleged victim has suffered relevant family violence; and

58. (ii) the alleged perpetrator committed that relevant family violence.”

59. Regulation 124 states as follows:

60. The evidence mentioned in paragraph 1.23(9)(c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and

(b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

61. *Migration (Specification of Evidentiary Requirements - Family Violence) Instrument (LIN 23/026)* 2023 and in particular *Schedule 1* thereof, sets out the types of evidence acceptable in relation to evidence of family violence. The schedule specifically refers to family violence support service providers and social workers, both of whom have provided evidence in support of the visa applicant's allegation of family violence. Additionally, the schedule sets out the items of evidence that are acceptable and the information that must be included.

62. The Tribunal is in receipt of a report from Ms Claudina Rodriguez of the *Immigrant Women's Support Service*. Ms Rodriguez holds a Bachelor of Arts degree and a degree in Psychology (Honours). Ms Rodriguez is a Case Worker employed by the service, which provides specialist domestic violence and sexual assault advice and support to women and children from culturally and linguistically diverse backgrounds.

63. It is Ms Rodriguez's professional assessment that the visa applicant's presentation and report of incidents to her are consistent with a range of domestic and family violence impacts. Ms Rodriguez believes that the visa applicant was subjected to the violence as described by her, perpetrated by the sponsor. The visa applicant continues to be significantly impacted by the abuse and was regularly distressed and crying when presenting her account of the incidents.

64. Ms Rodriguez concludes, in her professional assessment, that the detailed information provided by the visa applicant supports her allegation that she has experienced domestic violence as defined by the relevant legislation, that this was perpetrated by the sponsor and that it continues to affect her psychological well-being and results in an ongoing fear for her safety.

65. The Tribunal was provided with correspondence from the *Bridges Domestic and Family Violence Service*, an agency of *Save the Children Australia*. The report, dated 20 October 2019, is from Ruvimbo Choruma, a crisis accommodation support worker. The letter details that on 30 September 2019, the visa applicant was referred to the service by the State Domestic Violence Service – DV connect. The visa applicant required immediate crisis accommodation due to safety concerns pertaining to domestic violence.
66. The Tribunal has also been provided with a Statutory Declaration of Ms Antonia Deerain, a social worker with the *Women's House Shelta*. Ms Deerain holds a master's degree in Social Work and is a member of the Australian Association of Social Workers.
67. Ms Deerain supported the visa applicant over a 12-month period including providing a comprehensive risk assessment, a detailed support plan and regular one-on-one support sessions. Ms Deerain's report extensively details each of the areas of violence perpetrated by the sponsor against the visa applicant.
68. Ms Deerain concludes that the evidence of the visa applicant is consistent with her having been traumatised by serious domestic violence as per the definition of the relevant legislation. This violence has caused the visa applicant to reasonably fear for her safety and well-being.
69. The evidence relating to family violence committed against the visa applicant has been detailed above in this decision and includes the following actions by the sponsor against the visa applicant, as presented in the evidence of the visa applicant, Ms Rodriguez, Ruvimbo Choruma and Ms Deerain:
- (i) controlling and intimidating behaviour;
 - (ii) social isolation;
 - (iii) physical and sexual violence;
 - (iv) verbal and emotional abuse; and
 - (v) financial abuse.
70. In each regard, the Tribunal finds that the evidence provided by the visa applicant, Ms Rodriguez, Ruvimbo Choruma and Ms Deerain are conclusive in satisfying the applicable subclauses of Regulations 1.23 and 1.24 of the *Migration Regulations 1994* and Schedule 1 of *Migration Instrument (LIN 23/026) 2023*.
71. Having considered the evidence, the Tribunal is satisfied that the requirements of Cl.820.211(2) were met the time of the visa application. Further, the Tribunal is satisfied that the visa applicant suffered family violence against her by the sponsoring partner (and otherwise in accordance with Regulation 1.23) and therefore would have continued to meet the requirements of the subclause at the time of the decision but for those circumstances, hence satisfying the criteria in Cl.820.221(3).
72. The Tribunal is therefore satisfied the visa applicant meets the criteria of cl 820.211(2) and cl 820.221.
73. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

74. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named visa applicant meets the following criteria for a Subclass 820 (Partner) visa:

- CI 820.211(2) of Schedule 2 to the Regulations
- CI 820.221 of Schedule 2 to the Regulations

Edward Howard
Member

75.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).